

## **APPLICATION OF CDR REPORTING REQUIREMENTS TO ASBESTOS IMPORTED BY OCCIDENTAL CHEMICAL FOR USE IN ITS US CHLOR-ALKALI MANUFACTURING OPERATIONS**

On May 30, 2017, Safer Chemical Healthy Families, Environmental Health Strategy Center and Asbestos Disease Awareness Organization submitted a notice of intent to sue to restrain alleged ongoing violations of the Toxic Substances Control Act (TSCA) by Occidental Chemical Corporation (Occidental) pursuant to section 20(a)(1) of TSCA. The subject of the notice is Occidental's failure to report asbestos imports under EPA's Chemical Data Reporting Rule.

This paper provides the legal and factual basis for concluding that Occidental's non-reporting is a violation of TSCA which EPA should address under its TSCA enforcement authorities.

Legal Requirements. EPA has promulgated a Chemical Data Reporting ("CDR") rule, 40 C.F.R. Pt. 711, using its authority under section 8(a) of TSCA). The CDR rule requires the submission of basic information about chemical manufacturing processes and use and exposure profiles of commercially significant chemicals. Reporting is required for all chemicals manufactured or imported at a given site in amounts of 25,000 pounds or more in a given reporting year. Reports must be filed using what the Agency calls a "Form U." Manufacturers and importers subject to the CDR must submit these forms to the Agency every four years. The latest cycle was completed last fall, with reports due on October 31, 2016. The Form U must be filed for each manufacture or import site and include import/manufacture volume for each of the last four years, the number of workers exposed and basic information about site operations.

Section 15 of TSCA provides that it is unlawful for any person to –

“(1) fail or refuse to comply with any requirement of this title or any rule promulgated . . . under this title; or . . .

“(3) fail or refuse to . . . submit reports, notices, or other information, . . . as required by this Act or a rule thereunder;”

Failure to submit Form Us under the CDR is “unlawful” under section 15 and can give rise to civil and criminal penalties under section 16, actions for injunctive relief under section 17 and citizens' suits under section 20(a)(1) of TSCA. Such violations are continuing in nature because the obligation to report does not elapse on the reporting deadline but remains until the report is filed.

Chlor-Alkali Manufacturing. Occidental is one of 3 US manufacturers who use “asbestos diaphragm cells” in the chlor-alkali process for producing chlorine and other products such as caustic soda. The “asbestos diaphragm cell” is one of three types of electrolytic cells in commercial use in the US industry. The asbestos diaphragm separates the chlorine gas from the alkali metal hydroxide co-product by acting as a mechanical barrier between the two chambers. Occidental operates 8 plants using the asbestos diaphragm chlor-alkali process.

The chlor-alkali process is one of the last remaining asbestos applications in the US. According to EPA's recent scoping document for asbestos under TSCA, this use accounts for 100 percent of asbestos importation into the United States, most of which is produced in Brazilian mines.

Asbestos Regulatory Status under TSCA. EPA has identified asbestos as one of the initial 10 chemicals on which risk evaluations will be conducted under the amended version of TSCA. EPA released an asbestos scoping document – the first step in the risk evaluation process — on June 22. Chlor-alkali uses of asbestos are identified in this document as a condition of use which EPA intends to address in its risk evaluation.

Status of CDR Compliance. Because asbestos is a demonstrated hazard to human health and is among the first 10 substances on which EPA is conducting risk evaluations, compliance with the CDR rule is of utmost importance to assure that EPA has complete and accurate information about asbestos use in the United States.

Two of the three users of the “asbestos diaphragm” process for chlor-alkali production -- Axial Corp. and Olin Corp. – reported their asbestos imports during the 2016 CDR reporting cycle. However, we have not found any Occidental Form Us in EPA's CDR data-base which report its importation of asbestos.

To determine whether Occidental imported asbestos during the CDR reporting period, we searched Panjiva files. Panjiva (Panjiva.com) is a commercial, subscription-based database of international trade. It includes data from the U.S. Department of Homeland Security's Customs Agency, with the importation records of over 130 million shipments into the US. The records include descriptions of what was shipped, where it was shipped from, and who was receiving it.

More information on the Panjiva data-base of imported products is provided in Attachment 1.

Our search of the data-base indicated several import shipments of asbestos to Occidental facilities during 2013, 2014 and 2015. The amounts imported were as follows:

October-December 2013 – 231,397 pounds

2014 – 376,020 pounds

2015 – 289,246 pounds

According to Panjiva, the records for these shipments identify the consignee as either Occidental Chemical or BDP International. In the latter case, Occidental is typically listed as the importer of record.

Panjiva records showed asbestos imports by Occidental or BDP on behalf of Occidental on the following dates:

11/12/15	Occidental Chemical Corporation.
10/13/15	Bdp International Inc.
9/15/15	Bdp International Inc.

6/28/17

7/26/15	Bdp International Inc.
6/10/15	Bdp Projects Logistics
6/8/15	Bdp International Inc.
5/27/15	Bdp Projects Logistics
3/10/15	Bdp International Inc.
12/17/14	Bdp International Inc.
11/27/14	Bdp International Inc.
11/27/14	Bdp International Inc.
11/24/14	Bdp International Inc.
9/23/14	Occidental Chemical/Niagara Falls
9/5/14	Bdp International Inc.
5/25/14	Bdp International Inc.
4/23/14	Bdp International Inc.
2/6/14	Oxy Vinyls
12/4/13	Bdp International Inc.
10/27/13	Bdp International Inc.
10/17/13	Bdp International Inc.
10/2/13	Taft Plant Occidental Chemical Corp

There may have been additional imports in 2013 triggering CDR reporting that we did not identify because they were outside the scope of our search. Imports may also occurred in 2012 or earlier years which triggered reporting for the 2012 CDR reporting cycle. .

Applicability of CDR Reporting Requirements. We understand that Occidental believes that asbestos is exempt from CDR reporting because it is a “naturally occurring substance.” In our view, this exemption does not apply for two distinct reasons.

*First*, while 40 CFR §711.6(a)(3) provides that reporting is not required for “naturally occurring chemical substances,” section 711.8(b) states that:

For the 2016 submission period and subsequent submission periods, *any person who manufactured (including imported) for commercial purposes any chemical substance* that is the subject of a rule proposed or promulgated under TSCA section 5(a)(2), 5(b)(4), or 6, or is the subject of an order in effect under TSCA section 5(e) or 5(f), or is the subject of relief that has been granted under a civil action under TSCA section 5 or 7 *is subject to reporting* as described in §711.8(a), except that the applicable production volume threshold is 2,500 lb (1,134 kg)(emphasis added).

This language is unambiguous and clearly provides that, notwithstanding other exemptions, any chemical subject to regulation under the described TSCA provisions must be reported if it meets the applicable volume threshold (2,500 pounds).

Asbestos is regulated under section 6. 40 CFR Part 763, Subpart I. Thus, CDR reporting is required under the express terms of section 711.8(b).

*Second*, EPA has long defined “naturally occurring chemical substances” under 40 CFR 710.4(b) in terms of a narrow set of extraction and processing conditions. Under this definition, a substance that is naturally occurring will be exempt from reporting only if it “is naturally occurring and is (i) unprocessed or (ii) processed only by manual, mechanical, or gravitational means; by dissolution in water; by flotation; or by heating solely to remove water . . . .” As stated in EPA guidance on CDR reporting,<sup>1</sup> “[a]s a result of processing, a naturally occurring substance may no longer be considered a naturally occurring chemical substance under TSCA and would be subject to reporting under CDR.” As the guidance elaborates:

“When a naturally occurring substance is further processed in any manner other than as specifically described above in the definition for naturally occurring chemical substances (see the previous section), it is no longer considered a naturally occurring chemical substance as defined in 40 CFR 710.4(b) and, therefore, would not be exempt from reporting under the CDR rule.”<sup>2</sup>

While the mining and milling of asbestos may be a physical process that falls within the definition of “naturally occurring chemical substance,” the processing of asbestos to create diaphragm cells during chlor-alkali operations contains features that place it outside the scope of the definition. As noted in a 1988 EPA contractor report, the industry employs “modified asbestos diaphragms” consisting of “chrysotile and polymeric powders of fibers stabilized at high temperatures before use.” This technology “increases the stability of asbestos diaphragms and extends their service life.”<sup>3</sup> A recent industry submission to the EPA docket (Attachment 2) for the first 10 chemicals undergoing risk evaluations provides further detail. It explains that:

“Asbestos is mixed with caustic soda and salt to create a “slurry.” Halar or Teflon modifiers are added to allow for handling/storage in a dry non-friable form,

The asbestos slurry is deposited onto a screen and is heated in an oven to sinter the Halar or Teflon fibers to the asbestos, forming a non-friable asbestos diaphragm.”<sup>4</sup>

As this description confirms, in creating asbestos diaphragms, processing of the asbestos extends beyond “manual, mechanical, or gravitational means”, “dissolution in water” or “heating solely to remove water”, as required by the definition of naturally occurring chemical substances. Rather, it is mixed with caustic soda and then with polymeric fibers and heated to create a bond between the asbestos and polymeric fibers in order to alter the physical

<sup>1</sup> TSCA Chemical Data Reporting Fact Sheet: Reporting Manufactured Chemical Substances from Metal Mining and Related Activities, May 2016, at 2.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> ICF, *Asbestos Exposure Assessment*, prepared for the EPA Office of Pesticides and Toxic Substances, March 21, 1988, at 109-111.

<sup>4</sup> American Chemistry Council, Chlor-Alkali Process Controls and Protections, submitted to EPA-HQ-OPPT-2016-0736-0052, Attachment A to May 15, 2017 comments.

6/28/17

properties of the asbestos.

In short, the definition of “naturally occurring chemical substance” is inapplicable, and thus the asbestos as used in chlor-alkali is not exempt from CDR reporting.